Supreme Court, U.S.
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No. 95-786 NOV 15 1995

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

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CITY OF PORTLAND, a municipal corporation,

*Petitioner,*

v.

MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, and TERESA RUTHERFORD,

*Respondents.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AND

# APPENDIX

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## QUESTIONS PRESENTED

1. What is a vote; more particularly, is a consent to municipal annexation the constitutional equivalent of a vote, subjecting consent procedures to strict judicial scrutiny?

2. Does equating consent procedures with voting unconstitutionally deprive Oregon of the power, reserved to it by the Tenth Amendment, to determine when and how citizens are called upon to participate in matters of State concern where it is settled that there is no federal right to vote?

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## PETITION FOR WRIT OF CERTIORARI

## TO THE UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

The City of Portland, Oregon, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the East Ninth Circuit to review that Court's Opinion in the case of Hussey v. City of Portland, No. 93-35641.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit of which review is sought is reported at 64 F.3d 1260 (1995). The Opinion is reproduced in the Appendix at App-1. A previous Opinion, withdrawn upon a petition for rehearing, is reprinted at App-14. The district court Opinion reversed by the Ninth Circuit is found at App-21.

## JURISDICTION

The judgment of the Ninth Circuit is dated August 18, 1995. This Court has jurisdiction to review the Opinion below pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Ninth Circuit based its Opinion on a reading of the Equal Protection Clause of the Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## STATEMENT OF THE CASE

### A. The Facts

Acting in 1986 pursuant to what it considered an imminent threat to ground water quality in a large portion of Multnomah County, Oregon's Environmental Quality Commission ("EQC") directed the City of Portland to build hundreds of millions of dollars of sewer lines in an area known as East Multnomah County. The area was served at that time almost exclusively by septic tank systems. Part of the area to be serviced by the new sewers lay within the City of Portland. Part of the area was outside the City in unincorporated Multnomah County. The City was directed

to undertake the work in the entire area, even that outside its boundaries, because it was considered to be the only entity with the financial and technical capacity to manage the massive sewer project.

Those property owners whose property would be served by the new sewers would, under normal practice, bear the costs of the construction. In this case, however, because of concerns about financial impacts on homeowners, the Portland City Council adopted a program whereby City ratepayers would provide a subsidy to East Multnomah County homeowners to help them defray the sewer construction expenses. The subsidy varied by the size of the property and was typically about $2,500 per homeowner.

The Council determined, however, that persons living outside City boundaries should not automatically receive the City subsidy. Instead, it decided to allow non-residents to participate in the subsidy only if they signed written agreements under which, among other things, they consented to City annexation of their properties if the City later sought to initiate annexation of their area. Over many months, City staff solicited signed consents from residents in two capacities--as property owners and as registered electors.[1]

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[1] As discussed below, one step in one of Oregon's annexation methods is the filing of property owner and elector consents with the appropriate State agency as a prerequisite for the agency deciding whether to annex the area.

Under the City Council's program, all who wished to participate in the discount program had to sign agreements and prepay their reduced fees. The City also provided tax-free financing so that the participants could spread the cost out over time. Those living outside the City limits who wanted the subsidy also signed consents to annex. The "window of savings," as the program was called, closed on December 31, 1993. Those who did not sign up by that date could not receive the subsidy. The majority of East Multnomah County residents, including plaintiffs here, signed the appropriate documents and received the discount. The area was eventually annexed to the City.

The five plaintiffs in this case filed their action in October, 1992. They brought their claims pursuant to 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

B. The District Court Decision

In January, 1993, the District Court for the District of Oregon denied plaintiffs' motion for a preliminary injunction barring operation of the City's subsidy program. In June, 1993, on cross motions for summary judgment, the District Court granted the City's motion, denied the plaintiffs' motion, and entered judgment in the City's favor.

C. The Court of Appeals' Decision

On January 19, 1995, the Court of Appeals issued its first Opinion in this case. App-14. The Court declined to reach the constitutional issues raised by plaintiffs. Instead, it ruled that the City had, by tying its subsidy program to annexation consents, violated an Oregon State statute that

prohibits giving a "thing of value" as inducement for a person to vote in a particular manner. Or. Rev. Stat. § 260.665 (1993). The Court so held after it had concluded that signing a "consent" to annexation is the "functional equivalent" of a vote.

The City petitioned the Ninth Circuit for rehearing. In the alternative, the City requested that the Court of Appeals withdraw its Opinion and certify to the Oregon Supreme Court the State law question that it had addressed.

On August 18, 1995, the Court of Appeals granted the City's motion to withdraw its earlier Opinion. It did not certify any State law question to the Oregon courts. Instead, the Court reaffirmed its view that the signature by a registered voter on an annexation consent form is the equivalent of a vote. The Court concluded that signing a consent was the constitutional equivalent of a vote because

> [b]oth must be returned by registered voters; both are official expressions of an elector's will; both are required to resolve political issues; and both require a majority for success.

App-5.

Once it reached that conclusion, the Ninth Circuit subjected the City's sewer subsidy program to "strict scrutiny" analysis and concluded that "Portland's offer of a subsidy to electors who consent to annexation impermissibly burdens . . . [the] right to vote." App-3.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS DIVERGENCE AMONG THE CIRCUITS ABOUT WHAT CONSTITUTES A VOTE

The Ninth Circuit's decision is based on the premise that the consents signed in this case are the equivalent of "votes." That premise is placed in doubt by decisions in both the Fourth and the Sixth Circuits. The Ninth Circuit acknowledged that decisions in those circuits provide support for Portland's position that the Oregon annexation process at issue does not involve voting rights.

In both Carlyn v. City of Akron, 726 F.2d 287 (6th Cir. 1984) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), electors challenged annexation statutes that allowed property owners to "consent" to annexation without an election, but did not grant the registered voters the right to vote on the annexations. The Fourth and Sixth Circuits rejected equal protection challenges to these schemes based on the settled principle enunciated by this Court that no person has a constitutional right to vote, per se, on annexation questions. Hunter v. Pittsburgh, 207 U.S. 161, 178-179 (1907); Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978). The Fourth and Sixth Circuits noted also that neither property owners nor voters had ultimate control over annexation.

In reaching their decisions, the Fourth and Sixth Circuits necessarily, although implicitly, considered whether signing an annexation consent or annexation request form was the same as a vote. Each Court, likewise, necessarily decided that a consent was not a vote. In the Carlyn case,

property owners (freeholders) signed requests for annexation, the equivalent of Oregon's "consents." Despite that power to request annexation in writing, the Sixth Circuit "emphasize[d] that . . . freeholders . . . are [not] given the right to vote on annexation under the statute in question." Carlyn, 726 F.2d at 290. Had the Court considered a signed approval of annexation the equivalent of a vote, it could not have made this emphatic statement.

Similarly, in Berry v. Bourne, freeholders could initiate annexation by signing "requests" to annex. Electors objected to the fact that they could not vote on whether such requests should be honored. The Fourth Circuit rejected the electors' claims. In doing so, it noted:

> Clearly, if the statute before us had provided that annexation required the favorable vote of the freeholders of the area to be annexed and made no provision for voting by the electors of that area, the statute would be condemned as violative of the equal protection clause.

588 F.2d at 425 (emphasis added).

Obviously, the Fourth Circuit did not consider the freeholder requests or "consents" as the equivalent of votes. Otherwise, it would have found the statute "violative of the equal protection clause" for failing to give electors a chance to vote, as well.

The Ninth Circuit expressly declined to follow the reasoning of the Fourth and Sixth Circuits.[2] It also suggested, however, that their decisions are distinguishable because they each involved property owner consents, not elector consents. But there is no logical basis for concluding that a citizen's identical act - consenting - is constitutionally different if the citizen does the act as a voter or as a property owner.

Although this Court has frequently spoken about protections afforded to voting, the Court has had little opportunity to delineate when an expression of a citizen's opinion becomes a vote entitled to constitutional protection. As noted below, however, in the annexation context alone, many States have developed procedures which provide for public participation by soliciting opinions of citizens in forms not considered by the States to be votes. Such procedures should not be subjected to strict scrutiny analysis, with typically fatal results, in the federal courts. By subjecting Portland's annexation program under Oregon law to this type of judicial review, the Ninth Circuit opinion casts doubt on these forms of citizen participation in the annexation context, and elsewhere.

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[2] The Ninth Circuit found support for its own position in two State court cases. Town of Fond du Lac v. City of Fond du Lac, 126 N.W.2d 206 (Wis. 1964) and Curtis v. Board of Supervisors of Los Angeles County, 501 P.2d 537 (Cal. 1972). In the former, the court found illegal certain "coerced" annexation consents. In the latter, the court strictly scrutinized a procedure whereby property owners could prevent an annexation election from occurring.

## II. UNDER OREGON STATUTES, A CONSENT TO ANNEX IS NOT A VOTE

### A. Oregon Annexation Law: A Primer

Under Oregon law, annexations to municipalities in the Portland metropolitan area may occur in several ways. (Relevant Oregon annexation statutes are found in the Appendix at pages App-29 to App-42.) Because of concerns about rational provision of service in the growing metropolis of Portland and its suburbs, in almost all instances (including the annexations involved in this case), the decision-maker is a State agency known as the Portland Metropolitan Area Local Government Boundary Commission. Neither Portland nor any other city or special district can unilaterally annex any territory. Neither can any action by the voters cause annexation to occur. Or. Rev. Stat. §§ 199.460 - .534 (1993).[3] Further, consistent with this Court's precedents, many of the permitted annexation methods make no provision for elections of any sort.

Either a city council or the Boundary Commission can initiate an annexation simply by the passage of an annexation "resolution." Or. Rev. Stat. §§ 199.490(1)(a) and (b) (1993). Alternatively, ten percent of the electors registered within an area or owners of one-half the land in an area may petition for annexation. In all these cases, if the proposal is approved by the Boundary Commission, the annexation becomes final unless the lesser of ten percent or

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[3] Only one annexation method -- involving a complicated process of inter-governmental agreements -- does not require Boundary Commission approval. Or. Rev. Stat. §§ 195.205 - .235 (1993). This method is not relevant to this case.

100 of the electors in the area "remonstrate" in writing or the affected city files objections. Or. Rev. Stat. § 199.505 (1993). If that happens, an election is called at which the registered voters in the affected area or, in the case of an objecting municipality, the voters of the entire municipality, vote to approve or disapprove the Boundary Commission action. *Id.*

In some cases, however, no election will be held, even if citizens voice their protests. For instance, through the process of "island annexation," Boundary Commission approval of the annexation of an area geographically surrounded by a city is final and is not subject to remonstrance or election. Or. Rev. Stat. § 199.495 (1993), Or. Rev. Stat. § 222.750 (1993). Similarly, if the Oregon Division of Health concludes that sanitary conditions in an area endanger public health, annexation of the area can proceed without remonstrance or election. Or. Rev. Stat. § 199.495 (1993), Or. Rev. Stat. §§ 222.840 - .915 (1993).[4] Finally, if, when a city submits a resolution and petition to annex an area to the Boundary Commission, it also submits "consents from the owners of a majority of the land and a majority of the electors in an area," then Boundary Commission annexation approval for the area is final and not subject to remonstrance or election. Or. Rev. Stat. §§ 199.495, 199.490(2) (1993). This "double majority" method, involving written consents from electors and property owners, was used in the annexations involved in

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[4] Despite the purpose of the sewers involved in this case, the Division of State Health has not invoked this procedure in East Multnomah County.

this case.[5]

B. Statutory Intent

As is discussed more thoroughly in Part III of this petition, the Oregon Legislature created the consent process as an alternative to voting, not as a way of voting. Consents and voting constitute two separate and, by design, mutually exclusive processes. Compare Or. Rev. Stat. §§

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[5] The Oregon statutes contain one other method of annexation allowing annexations to proceed without a vote. The so-called "triple majority" rule works like the double majority method, except that instead of voter and landowner "consents," consents are obtained from "more than half the owners of land in the [affected] . . . territory, who also own more than half of the land [in the affected] . . . territory . . . representing more than half of the assessed value of all real property in the [affected] territory. . . ." Or. Rev. Stat. § 199.490(2)(a)(A) (1993). This method is not used in the State, however, because in 1986 the Oregon Court of Appeals ruled that it violated the Oregon State "equal privileges and immunities" clause by allowing property owner consents alone to be the basis for a decision not to proceed with an election. Mid-County Future Alternatives v. Portland Metropolitan Area Local Government Boundary Commission, 82 Or. App. 193, 728 P.2d 63 (1986) *as amended* 83 Or. App. 554, 733 P.2d 451 (1987). (The Court of Appeals' decision was vacated as moot on appeal to the Oregon Supreme Court, 304 Or. 89, 742 P.2d 47 (1987) but its informal precedential power continues to exert influence over annexation proceedings.) Ironically, the Legislature solved the problem created by the Mid-County opinion by creating the double majority system used in this case. It did so by giving voters the same power as property owners to "prevent" elections by signing written consents. The double majority method of annexation was subsequently challenged under Oregon's Constitution. The Oregon Court of Appeals found no constitutional infirmity and upheld double majority annexation. Mid-County Future v. Portland Metropolitan Area Local Government Boundary Commission, 106 Or. App. 647, 809 P.2d 1354, *rev. den.*, 312 Or. 80 (1991).

199.490(2), 199.495 (1993) (consents) with Or. Rev. Stat. § 199.505 (1993) (elections). Oregon has extensive statutes governing elections and voting. Or. Rev. Stat. Title 23, Chapters 246 to 260 (1993). The statutes governing annexation elections reference the general election rules, Or. Rev. Stat. § 199.505(3) (1993), whereas the Legislature made no tie between the consent process and election standards. Finally, the Legislature clearly contemplated that local governments and citizens who consent to annex could enter into contracts in which the consent was part of the consideration. The Legislature provided for the recording and binding effect of such contracts. Or. Rev. Stat. § 222.115 (1993). If the Legislature considered consents to be the equivalent of votes, it would not have assumed that consents could be obtained through the exchange of consideration.

C. Consents and Votes Have Different Characteristics

The Ninth Circuit pointed out four characteristics shared by the consent process at issue and voting.

> [b]oth must be returned by registered voters; both are official expressions of an elector's will; both are required to resolve political issues; and both require a majority for success.

App-5. It is unclear whether the Court intended this to be the test for determining what is a vote, or whether it was merely making observations about similarities between consents and votes. The Court cited no authority for the "test" it stated.

Although there are similarities, the consent process also differs from voting in many significant ways. In an election on an issue, such as annexation, a voter typically votes for or against a proposition. In the consent process at issue, there is no way to "vote" against annexation. The person either consents to annexation, or declines to consent. The latter has no binding effect. Voting is at least bi-directional; consenting is uni-directional.

Unlike an election, in which an elector gets one chance and casts an irrevocable vote, a person who has declined to consent can subsequently change his or her mind and consent. Furthermore, in any subsequent election on the same annexation question, a person who previously declined to consent can now vote for or against annexation. Moreover, if there is a subsequent election, even a person who previously consented may participate and vote for or against the very same annexation proposal.[6]

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[6] The consent forms utilized by Portland in this situation purported to preclude the consenter from voting in a subsequent election and purported to constitute an affirmative vote in such an election. Whether such provisions would be void under the relevant Oregon statutes is not at issue in this case. There has been no election, no attempt to enforce these provisions, and no challenge by plaintiffs to the content of the consent forms. The important point is that Oregon statutes, which create the consent process that the Ninth Circuit said was voting, allow even a person who consents to annexation to vote subsequently if an insufficient number of consents is obtained and an election occurs.

In an election, a majority (or some other percentage) of votes cast by electors is sufficient to produce a result (e.g. to elect a candidate) or to authorize subsequent government action (e.g. to issue bonds). In the consent process involved in this case, a majority of consents by electors[7] has no effect by itself. Before the Boundary Commission may utilize double majority annexation, consents must also be obtained from a majority of property owners.

In a vote, electors have a limited period of time in which to cast votes under uniform and carefully controlled conditions. In a consent process such as the present one, consents are obtained by individual solicitations over a considerable period of time. Consents, in other words, have none of the trappings of conventional contemporary elections in which electors are typically allowed to vote in secret, and outside influences are carefully regulated during the casting of ballots.

An election is an event during which all electors are simultaneously given the opportunity to take specific actions by casting votes which are final and have immediate legal effect. Under Oregon procedures, consents to annex are obtained only from those electors (and others) the City chooses to approach, and have no legal effect unless the City chooses to utilize the consents.

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[7] The type of majority required in elections is very different from that required in the consent process here. Elections are decided by a majority (or occasionally some other percentage) of those who choose to vote. Double majority annexation requires consent from a majority of <u>all</u> electors and <u>all</u> property owners in the area which may be annexed.

Consents - a form of contract - are effective for one year. Or. Rev. Stat. § 222.173 (1993). At any time, the City may cease soliciting consents, whether a majority has been obtained or not. Even if a majority is obtained, the City need take no further action to initiate annexation.

Consents are a prerequisite to annexing in a certain way, and nothing more. By consenting to annexation of the area in which the elector resides, the elector is merely acquiescing in allowing the City and Boundary Commission to utilize a certain annexation procedure, if they choose to do so. The consenter may actively favor, oppose, or be neutral about eventual annexation. If sufficient numbers and types of consents are obtained, the City may proceed to initiate an annexation process which does not provide for an election, and the Boundary Commission may go through the process of annexing without an election. If consents are not obtained, annexation may proceed by other methods.

Therefore, while consents and votes share some important characteristics, they differ in other important ways. Two State courts and a federal district court that have specifically addressed the issue concluded that consents, or similar processes such as petitions, are not votes. Willows v. City of Lewiston, 461 P.2d 120, 124 (Idaho 1969); Town of Falls Church v. County Board of Arlington County, 184 S.E. 459, 461 (Va. 1936); *see also*, Township of Jefferson v. City of West Carrolton, 517 F. Supp. 417, 420-421 (S.D. Ohio 1981), *aff'd*, 718 F.2d 1099 (6th Cir. 1983); *but see*, Town of Fond du Lac v. City of Fond du Lac, 126 N.W.2d 206 (Wis. 1964). As noted above, the Fourth and Sixth Circuits have implicitly come to the same conclusion in decisions examining consent processes in South Carolina and Ohio.

The determining factor for the Ninth Circuit appears to have been that the consents were signed by registered voters. The Court declared that it would not view identical consents signed by property owners as votes, for "[w]ithout the participation of voters, there can be no voting." App-7. Whether or not this is true in every case, not every expression of position on public issues by an elector is a vote. There is no basis, finally, for concluding that an identical act--signature of a consent form--is constitutionally different simply because the citizen signing the form is labeled "elector" in one instance and "property owner" in another.

### D. The City May Condition Its Subsidy On the Recipient's Consent to Annexation

It is not unconstitutional to attach reasonable conditions to government assistance programs, even those, unlike the present case, that restrict the exercise of constitutionally protected rights, where the recipient is free to avoid the condition simply by declining to participate in the program altogether. Therefore, it surely is not unconstitutional to condition provision of a sewer subsidy on consenting to become a part of the governmental unit providing the subsidy.

This Court has twice recently rejected challenges to conditions on government assistance that plaintiffs contended violated their First Amendment rights. In those cases, the Court noted that the recipient of the benefit is in no way compelled to operate under the program; "to avoid the force of the regulations it can simply decline the [assistance] ...." Rust v. Sullivan, 500 U.S. 173, 199, n. 5 (1991). Claimed constitutional violations in such situations warrant only brief

consideration because the government is free to attach "reasonable and unambiguous conditions to federal financial assistance that [benefitting] . . . institutions are not obligated to accept." Grove City College v. Bell, 465 U.S. 555, 575 (1984).

In the present case, the City was also free to impose reasonable requirements on those persons who wished to participate in the City financed subsidy program. The sewerage program was imposed on the City and East Multnomah County residents by the State EQC. The sewer connection was mandatory on all affected properties. No one was forced to sign the consents or to accept the money provided by City of Portland ratepayers to soften the financial impact of that mandatory connection. The rationale behind the City's program was neither nefarious nor evil. It reflected the simple policy choice that City ratepayers should only be asked to provide substantial financial subsidies to those who would consent to become part of the City.

The Ninth Circuit's determination that the conditions imposed on receipt of this financial benefit were constitutionally impermissible because poorer East Multnomah County residents would be more inclined to accept the benefit along with the condition ignores the fact that virtually all government entitlement programs operate in exactly the same way. For the hard truth is that many public subsidy or benefits programs impose conditions on recipients, and the incentive to accept such conditions may be greater for those citizens most in need of the program. This reality does not create a federal constitutional case every time receipt of a governmental benefit involves a corollary burden or responsibility.

The City's program was merely an offer of financial assistance which could be accepted or rejected. There is nothing unconstitutional about conditioning such an offer of assistance on the recipient's willingness to become part of the municipality whose ratepayers are providing the funds. The City's reasonable policy choice should have been accepted by the Ninth Circuit had the program been examined under the rational basis review appropriate to this case.

## III. THE NINTH CIRCUIT'S RULING DIVESTS OREGON AND OTHER STATES OF POWERS RESERVED TO THEM UNDER THE TENTH AMENDMENT

Nearly ninety years ago, this Court declared that there is no inherent constitutional right to vote on questions of municipal creation, consolidation, and annexation in Hunter v. City of Pittsburgh. Municipalities are creatures of the States and they may be constitutionally created or destroyed, expanded or contracted, by whatever route the various State Legislatures desire.

The Court has also made it clear that States retain their authority to decide who votes, when, and under what conditions in State elections. Oregon v. Mitchell, 400 U.S. 112 (1970), *reh'g den.*, Texas v. Mitchell, 401 U.S. 903 (1971). That authority is protected from infringement by the federal government--including the federal judicial branch--by the Tenth Amendment. Of course, that authority is limited

> to the . . . extent that the people through constitutional amendments have specifically narrowed the powers of the States, [such as] Amendments Fourteen, Fifteen, Nineteen, and

Twenty-four. . . .

400 U.S. at 125. Even those limiting amendments, however, have "each . . . assumed that the States had general supervisory power over State elections. . . ." 400 U.S. at 125-26.[8]

As discussed above, the Oregon Legislature has crafted a complex array of annexation methods - some of which provide for an election, some of which provide for consents, and some of which provide for neither consents nor an election. The method used in this case - so called "double majority" - specifically provides that if a sufficient number of consents is received, then no election occurs. In other words, the Oregon Legislature obviously intended that consents would be different from votes. A significant number of States around the country similarly provide for non-electoral avenues of political participation in the annexation process.[9]

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[8] Even if consents were votes, it is not clear that the federal government has authority to intervene in purely State elections to prevent the sort of "undue influence" the Ninth Circuit perceived to be created by the City's subsidy program. *See*, United States v. Malamy, 671 F.2d 869, 875 (5th Cir. 1982); United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981); United States v. Carmichael, 685 F.2d 903, 908 (4th Cir. 1982), *cert. den.*, 459 U.S. 1202, (1983) (discussing constitutionality of federal prohibition on vote buying in state elections, 42 U.S.C. § 1973i(c)).

[9] Approximately twenty-five states have established statutory annexation schemes in which traditional voting is not required. Some involve written consent procedures, some involve petition procedures, some permit annexation by ordinance, and some involve a combination of several such methods in conjunction with or in lieu of voting. *See*, Ariz. Rev. Stat. Ann. § 9-471 (1990 and Supp. 1995); Cal. Gov't

The Ninth Circuit's Opinion undermines the authority of Oregon and other States to make decisions about who can vote and when on a municipal annexation question. This outcome is inconsistent with U.S. Term Limits, Inc. v. Thornton, ___ U.S. ___, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) in which the prerogative of States to establish something as dramatic as term limits on State office holders was never even questioned. As was stated by Justice Kennedy in concurrence, "the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province." 131 L.Ed.2d at 923. Even the proposition that the Constitution limits the ability of individual States to impose term limits on federal congressional offices garnered a vigorous Tenth Amendment based dissent from four members of this Court in Thornton.

The Ninth Circuit justified its interference with Oregon's decisions on the methods for public participation in annexation questions as being required by strict scrutiny review under the Equal Protection Clause of the Fourteenth

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Code § 56837 (Supp. 1995); Fl. Stat. § 171.0413 (1994); Ga. Code Ann. § 6-36-21 (1995); Ill. Rev. Stat. Ch. 65, § 5/7-1-2 (1995); Ind. Code. Ann. § 36-4-3-4 (1993); Kan. Stat. Ann. § 12-520A (Supp. 1994); Ky. Rev. Stat. § 81A.420 (1995); La. Rev. Stat. Ann. § 151 (1995); Miss. Code Ann. § 21-1-27 (1995); Nev. Rev. Stat. § 268.236 (1993); N.H. Rev. Stat. Ann. §§ 52:5, 52:3 (1991) & Supp. 1994); N.J. Rev. Stat. § 40A:7-12 (1994); N.Y. Gen. Mun. Law § 703 (1994); N.M. Stat. Ann. § 3-7-17 (1995); North Dakota State Constit. Art. VII, § V; Okla. Stat. Ann. Tit. 11, § 21-104 (1995); Tenn. Code Ann. § 6-51-102 (1992); Utah Code Ann. § 10-2-415 (1992); Vt. Stat. Ann. Tit. 2 § 17 (1985); Va. Code § 15.1-1033 (1989); Wash. Rev. Code Ann. § 35.10.217 (1994); W. Va. Code § 8-6-4 (1990); and Wyo. Stat. § 15-1-405 (1995).

Amendment. By thus purporting to protect the rights of voters, however, the Ninth Circuit has essentially told Oregon who may vote and who may not and under what conditions, on a matter -- annexation -- which this Court has found does not trigger a federal right to vote.

The Tenth Amendment reserves to the States precisely this type of decision. "The Fourteenth Amendment was [not] intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." Oregon v. Mitchell, 400 U.S. at 127. By concluding that a carefully crafted "non-electoral" public participation process is the "functional equivalent of a vote," the Ninth Circuit has intruded on a State's options in a manner which, ironically, is likely ultimately to limit State-created rights of political participation. If innovative avenues for citizen participation in State political matters such as annexation are ultimately subjected to strict scrutiny in federal court, the likely and natural response will be to limit State-created avenues of participation to those occasions where a federal right to vote exists.

In the present case, Oregon's Legislature created a variety of methods for municipal annexation. In the Portland metropolitan area, all but one method are subject to the jurisdiction and approval of a State agency, the Metropolitan Area Boundary Commission. Some of those methods allow affected persons to vote on the annexations. Some allow no citizen input except testimony at public hearings before the deciding body. And some methods, including the middle ground annexation method used in this case, allow significant citizen roles in annexation, but through a non-electoral process.

The Oregon Legislature did not consider the consent process to be the "functional equivalent" of an electoral voting process. The State has detailed statutes for the conduct of elections to protect the voting process. Or. Rev. Stat. Title 23, Chapters 246 to 260 (1993). None of these State election law procedures are made applicable to the municipal annexation consent process. To the contrary, the consent process is used in lieu of voting, as a means to allow citizen participation without the full panoply of rights and limitations involved in electoral politics.

Further, it is obvious that the Legislature understood that the consent process could proceed in a manner that would allow substantial flexibility in arrangements between citizens and their government. In fact, the Legislature contemplated the sort of agreements invalidated by the Ninth Circuit in this case. Under the City plan, non-residents of Portland could obtain subsidies financed by Portland's sewer ratepayers if they agreed to join the City. Far from banning such deals as a violative of the electoral process, the Legislature has declared that similar deals are to be formalized. Or. Rev. Stat. § 222.115 (1993) directs that any

> contract between a city and a landowner relating to extraterritorial provision of service and consent to eventual annexation of property of the landowner shall be recorded and, when recorded, shall be binding on all successors with an interest in that property.

By declaring that written consents are the same as "votes," the Ninth Circuit has, in essence, eliminated the flexibility inherent in the consent process and left Oregon

with only two methods of annexation--one in which citizens can do no more than lobby the decision-makers and another in which everything they do is viewed as a "vote." With that flexibility gone, there is no longer the option for the government and its citizens, in essence, to form contracts, as the Legislature contemplated, in which benefits are provided in return for acceptance of annexation.

The Ninth Circuit's view limits a State's ability to provide for public participation short of a vote. The ironic result of the Court's attempt to protect voters' rights may be that citizens are given fewer rights to participate. This outcome is inconsistent with the Ninth Circuit's authority under the Equal Protection Clause and infringes on the rights of Oregon protected under the Tenth Amendment. The State retains the power to design the circumstances under which State elections will occur, without federal court interference.

## CONCLUSION

The City's petition for writ of certiorari should be granted.

Respectfully submitted,

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November 15, 1995

# APPENDIX

## APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, and TERESA RUTHERFORD, Plaintiffs-Appellants, v. CITY OF PORTLAND, a municipal corporation, Defendant-Appellant. | ) No. 93-35641 ) DC No. CV92-1302-HJF ) ORDER AND OPINION |

Appeal from the United States District Court for the District of Oregon Helen J. Frye, District Judge, Presiding

Argued and Submitted
October 31, 1994--Portland, Oregon

Memorandum Filed January 19, 1995
Memorandum Withdrawn August 18, 1995
Filed August 18, 1995

Before: Betty B. Fletcher, Dorothy W. Nelson, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

OPINION

RYMER, Circuit Judge:

We must decide whether the City of Portland's ordinance requiring non-residents to consent to annexation as a condition of receiving a subsidy, or reduction in hook-up costs, for mandated sewer connections, violates their federal constitutional rights to free speech or equal protection.

[1] Michelle and James Hussey along with several of their neighbors[1] are homeowners residing in an area of East Multnomah County outside the City of Portland called "Mid-County" who are required to connect to the City sewer system. When Portland decided to offer connection at a reduced charge to those who signed irrevocable consents to annexation, Hussey sued for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988. On cross-motions for summary judgment, the City prevailed. Hussey appeals, arguing that since consent of a majority of electors (registered voters), as well as homeowners, is required for annexation under Oregon law, the City has infringed the electors' rights to political speech, and that by imposing financial distress upon those who refuse to consent, the City has violated their rights to equal protection. We hold that Portland's offer of a subsidy to electors who consent to annexation impermissibly burdens Hussey's right to vote.[2] We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

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[1] Mary Fran Mathis, John Rutherford and Teresa Rutherford. Together they are referred to as "Hussey."

[2] We do not reach Hussey's other constitutional argument, that the ordinance violates his First Amendment rights to speech.

I

In 1986, the State of Oregon's Environmental Quality Commission ordered the City of Portland to provide sewer services to residents of Mid-County, who must connect to the sewers. The Commission forbade the City from requiring annexation as a condition of using its sewer systems. Some of the Mid-County area is within the City; some is not. Historically, Portland has charged the actual costs of installing sewers against the properties benefitted. In this case, however, it adopted a program to minimize financial distress faced by City residents, funded by sewer customers within the City, and decided to extend the same program to owners of single family residential property outside the City limits but inside the Portland Urban Services Boundary if they consented to annexation. Hussey is in this group.

City Ordinance 165188, implementing the program, was enacted March 11, 1992. It provides a sewer connection subsidy to homeowners who irrevocably consent to annexation as both landowners and electors. The subsidy, which depends on lot size and the date on which the property owner consents, can be thousands of dollars.

Under Oregon law, annexation may be accomplished in several ways, two of which are relevant here: in a conventional election by a majority of the ballots cast, ORS § 222.120(4)(a); or by the written consent of a majority of all voters registered in the territory to be annexed, and the written consent of owners of a majority of the land in that territory -- the so-called "double majority" method. ORS § 199.490(2)(a)(B). Under both approaches, either all the territory will be annexed or none of it will be.

II

Hussey argues that imposing financial distress only on electors who oppose annexation violates his personal right to equal protection under the Fourteenth Amendment because once a governmental entity extends the right to vote on a particular subject to its citizens, that right to vote has the same constitutional significance as the right to vote on any other issue, and that the government therefore should be bound by the same constitutional standards as in a conventional election. Since Oregon law requires the assent of electors for annexation, Hussey submits that Portland may not restrict that form of voting without a compelling state interest. There can be none, in his view, as the integrity of the political process is at stake.

Portland, on the other hand, denies that there is any financial penalty involved and argues that, in any event, as a matter of law there is no inherent state or federal constitutional right to vote on annexation. Further, the City contends that because ORS § 199.490(2)(a)(B), the statute applicable here, does not provide for a right to vote, the constitutional standards that govern a conventional election are not implicated in Hussey's case.

A

[2] As the position of both parties turns on whether consents by electors are the constitutional equivalent of "voting," we address this issue first. We conclude that they are. Both must be returned by registered voters; both are official expressions of an elector's will; both are required to resolve political issues; and both require a majority for success. Without the consent of a double majority of registered voters

and landowners, Portland would have had to conduct an election to annex Mid-County. And, the consent forms themselves state that if Portland attempts to annex Mid-County by election, "this agreement constitutes a waiver of the right to vote . . . . [and] such persons shall count as yes votes."

[3] Portland correctly points out that there is no federal or Oregon state constitutional right to vote on annexation. "There is no federal constitutional right to vote on municipal annexations. We are also unable to find any such right in the Oregon Constitution." *Mid-County Future Alternatives Comm. v. City of Portland*, 795 P.2d 541, 549 (Or.), cert. denied, 498 U.S. 999 (1990) (citation omitted); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) ("The State . . . at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality . . . . with or without the consent of the citizens."). Nevertheless, once citizens are granted the right to vote on a matter, the exercise of that vote becomes protected by the Constitution even though the state was not obliged to allow any vote at all. The Supreme Court has subjected to strict scrutiny statutes governing the eligibility of voters to participate in school district elections, for example. "The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628-29 (1969).

Although we acknowledge a state's considerable latitude in matters of suffrage, we are not persuaded by Portland's argument that "consents" are not votes but are just

"consents." Labelling cannot be dispositive; otherwise a state could escape the laws protecting voters in a gubernatorial election, for example, merely by declaring that the governorship would be determined by which candidate has the most "consents."

The best support for Portland's position that this annexation does not involve voting rights is found in two decisions by other circuits. In *Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984), the Sixth Circuit held that voting rights were not implicated by an annexation procedure initiated by the petition of a landowner. Although without the landowner's petition, annexation could only be initiated by a majority vote of the electorate, the ultimate authority for any annexation rested with the county commissioners. It was this fact that the court thought dispositive.

> Ohio has not committed any final authority to voters in the township concerned. . . . The vote accorded by Ohio to township voters would simply have the function of putting the issue before [the] Board.

Id. at 289.

The Fourth Circuit has taken the same view, explaining that although "[i]t is true that three-fourths of the [landowners] in the area to be annexed must request annexation before the . . . annexing city may" do so, this procedure does not implicate voting rights because the ultimate annexing authority is vested in the governing board of the annexing city. *Berry v. Bourne*, 588 F.2d 422, 424 (4th Cir. 1978).

As in *Berry* and *Carlyn*, ultimate annexation authority in this case rests not with the voters, but with the Oregon Boundary Commission. We decline, however, to follow the reasoning of those cases.

[4] Contrary to the statements in *Berry* and *Carlyn*, traditional voting often has no direct, dispositive effect, but rather takes effect only when acted upon by others. For example, voters do not choose the president, the electoral college does. But that does not show that citizens do not vote in presidential elections. Similarly, voter approval of a bond referendum does not compel a municipality to issue the bonds. If other financing is available, or interest rates move adversely, the government may decline to issue the bonds notwithstanding the voters' authorization. Yet the Supreme Court has explicitly held that municipal bond referendums do involve voting. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). We decline to hold, therefore, that the annexation proceeding here did not involve voting merely because the Boundary Commission--as well as electors and landowners--would have to approve any boundary changes before they took effect.

Although we do not agree with the reasoning of *Berry* and *Carlyn*, we have no quarrel with their results. Neither of the annexation methods at issue in those cases granted electors any say in the proceedings; the consent of landowners alone was required. Without the participation of voters, there can be no voting.

[5] We find more persuasive two state supreme court decisions which held that annexation proceedings similar to the one at issue here were sufficiently similar to voting to be treated as such. In *Town of Fond du Lac v. City of Fond du*

*Lac*, 126 N.W.2d 201 (Wis. 1964), the Wisconsin Supreme Court invalidated an annexation ordinance because some of the signatures on the annexation petition had been coerced: two residents were offered a year's free rent if they would sign the petition, while two others were told they would be evicted if they failed to sign. The court declared that:

> The signing of a petition for annexation is more than the exercise of a private right or of a property right. The right of an elector to participate in an annexation proceeding partakes of the nature of a political right "analogous to voting upon the question" and therefore must be the elector's "individual act . . . discharging his duty in shaping and influencing this particular affair of government." . . . The signing of an annexation petition, like voting, constituting participation in a governmental process is governed by a higher standard of conduct than prevails in the marketplace--votes are not a commodity of commerce.

Id. at 203-04.

The California Supreme Court reached a similar conclusion in *Curtis v. Board of Supervisors of Los Angeles County*, 501 P.2d 537 (Cal. 1972). California permitted persons owning a majority of land within a proposed annexation area to prevent an annexation election by filing a written protest. Residents who wished to vote in the election challenged the law. Defendants argued that no voting rights were involved since the landowners' written protest was not an election. The court, however, determined that since the protest prevented an election, it was still subject to strict scrutiny:

> We find it unnecessary to decide whether [the protest] procedure constitutes an "election;" our obligation of "active and critical analysis" is not limited to statutes establishing electoral qualifications as such, but extends to laws which "touch upon" or burden the right to vote.

Id. at 544 (footnote omitted).

> We conclude that a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to "touch upon" and to "burden" the right to vote, and therefore must be examined under the strict equal protection standards.

Id. at 546.

[6] Portland may pursue annexation either by calling for an election, which no one disputes would involve voting, or by the consent of a double majority of landowners and registered voters. The conclusion is inescapable that the common thread between these procedures is that both require the consent of the governed. That is what voting is. Because the consent forms are analytically like votes, and are a substitute for them, legally they must be treated as votes.

B

Hussey contends that the Portland ordinance impinges on fundamental "personal rights protected by the Constitution," and is therefore subject to strict or close scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The right allegedly impinged on is the right to vote.

While "[i]t is beyond cavil that voting is of the most fundamental significance under our constitutional structure," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quotations omitted), courts do not "subject every voting regulation to strict scrutiny." Id.

"[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Id. at 434 (quotations omitted). However, "when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. (quotations omitted).

The Court has "upheld generally applicable and even- handed restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). For example, the Court found reasonable a prohibition on write-in votes where it was relatively easy for candidates to appear on the ballot. *Burdick*, 504 U.S. at 441. Similarly permissible are brief residency requirements for voters. *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (fifty-day residency requirement permits county recorder time to certify correctness and completeness of registrations).

Nevertheless, the Court has subjected to strict scrutiny--and struck down as unconstitutional--other statutes that more seriously interfere with the right to vote. See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized . . . . [T]he right to vote is too precious, too fundamental to be so burdened or conditioned" by a poll tax.); *Kramer*, 395 U.S. at 633 (granting franchise in school district elections only to property owners and parents of school children fails strict scrutiny). We have no difficulty concluding that the subsidy here is unlike the reasonable, minor restrictions present in *Burdick* and *Marston*, and is similar to, but more distorting than, the poll tax at issue in *Harper*. In *Burdick* and *Marston*, the statutes promoted traditional goals of elections: accurate and complete voter registration, and channeling votes to legitimate candidates. While "there must be a substantial regulation of elections if they are to be fair and honest," *Storer v. Brown*, 415 U.S. 724, 730 (1974), the Portland ordinance does not fall into this category of legislation which is subject only to limited scrutiny.

[7] Instead, the Portland ordinance severely and unreasonably interferes with the right to vote. Like the poll tax in Harper which was "closely scrutinized," 383 U.S. at 670, the subsidy here disproportionately affects the poor. But unlike a poll tax, which applies regardless of how a voter casts his ballot, this subsidy is conditioned on how an elector votes. In this way, the Portland ordinance is even more distorting than a poll tax. Portland argues that its ordinance should only be subjected to the rational basis test, relying on *Blackwell v. City of St. Charles*, 726 F. Supp. 256 (E.D. Mo. 1989), aff'd per curiam, 917 F.2d 1150 (8th

Cir. 1990). Although *Blackwell* does apply rational basis scrutiny to an annexation scheme similar to Portland's, the annexation there differed in one critical respect: landowners, and not voters, were asked to consent to annexation. As we scrutinize the Portland ordinance more closely only because it involves the consent of voters, which we equate with voting under the facts of this case, and not because it involves the consents of landowners, *Blackwell* does not speak to the annexation proceeding at issue here.

Like other "severe restrictions" on the right to vote, therefore, the Portland ordinance can only stand if it is "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992).

C

[8] Portland does not argue that its ordinance can survive strict scrutiny, and it cannot. While Portland's stated goals of promoting stability of neighborhoods and aligning service and tax boundaries are certainly legitimate, they are not compelling. Portland is free to charge residents of unincorporated areas its estimated actual cost of servicing them. Moreover, it is not necessary that Portland link its subsidy to a person's vote. It could offer the subsidy to all Mid-County homeown- ers as an inducement to vote for annexation, but has chosen not to. The Portland ordinance has, in effect, created a classic Prisoners' Dilemma, thereby subverting the process through which citizens consent to be governed.

The Portland ordinance fails the close scrutiny test both because Portland's goals are not "compelling" and because the ordinance is not "narrowly drawn" to achieve that goal. *Norman*, 502 U.S. at 289. As such, the Portland ordinance is an unconstitutional infringement on the fundamental right to vote. It is designed to distort the political process by granting substantial subsidies based solely on whether a voter consents to annexation, and it cannot stand.

REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, and TERESA RUTHERFORD, Plaintiffs-Appellants, v. CITY OF PORTLAND, a municipal corporation, Defendant-Appellant. | No. 93-35641<br>DC No. CV92-1302-HJF<br>MEMORANDUM |

Submitted: October 31, 1994
Filed: January 19, 1995

Before FLETCHER, D.W. NELSON, and RYMER, Circuit Judges

We are asked to decide whether the City of Portland's ordinance requiring non-residents to consent to annexation as a condition of receiving a subsidy, or reduction in hook-up costs, for mandated sewer connections, violates their federal constitutional rights to free speech and equal protection, or Oregon's election laws prohibiting undue influence in connection with voting.

Michelle and John Hussey along with several of their neighbors[1] are homeowners residing in an area of East Multnomah County outside the City of Portland called "Mid-County." Mid-County homeowners are required to connect to the City sewer system; the City must provide the sewer, and may not condition its service on consent to annexation. When Portland decided to offer connection at a reduced charge to those who signed irrevocable consents to annexation, Hussey sued for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988. On cross-motions for summary judgment, the City prevailed. Hussey appeals, arguing that since consent of a majority of electors (registered voters), as well as homeowners, is required for annexation under Oregon law, the City has infringed the electors' rights to political speech, and by imposing financial distress upon those who refuse to consent, the City has violated their rights to equal protection. Hussey's complaint also alleges violation of Oregon Revised Statute (ORS) § 260.665, which prohibits giving money or value for a vote. We hold that Portland's offer of a subsidy to electors who consent to annexation is a thing of value given to induce a vote in violation of Oregon's undue influence statute. For this reason we do not reach Hussey's federal constitutional claims. As we have jurisdiction under 28 U.S.C. § 1291, we reverse.

In 1986, the State of Oregon's Environmental Quality Commission ordered the City of Portland to provide sewer services to residents of Mid-County, who must connect to the sewers. The Commission forbade the City from requiring annexation as a condition of using its sewer systems.

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[1] Mary Fran Mathis, John Rutherford and Teresa Rutherford. Together they are referred to as "Hussey."

Some of the Mid-County area is within the City; some is not. Historically, Portland has charged the actual costs of installing sewers against the properties benefitted. In this case, however, it adopted a program to minimize financial distress faced by City residents, funded by sewer customers within the City; and decided to extend the same program to owners of single family residential property outside the City limits but inside the Portland Urban Services Boundary if they consented to annexation. Hussey is in this group.

City Ordinance 165188, implementing the program, was enacted March 11, 1992. It provides for a subsidy on connections for single family residences in Mid-County provided that the homeowner irrevocably consents to annexation as both a homeowner and an elector. The subsidy, which depends on lot size and the date on which the property owner consents, is substantial.

Under Oregon law, annexation may be accomplished in several ways, two of which are relevant here: in a conventional election by a majority of the ballots cast, ORS § 222.120(4)(a); or by the written consent of a majority of all voters registered in the territory to be annexed, and the written consent of owners of a majority of the land in that territory -- the so-called "double majority" method. ORS § 199.490(2)(a)(B). Under both approaches either all the territory will be annexed or none of it will be.

II

A court should refrain from deciding a constitutional issue when its decision could be based on nonconstitutional grounds. Figueroa v. Sunn, 884 F.2d 1290, 1292 (9th Cir. 1989). In addition, "[i]t is well-established that this court should avoid adjudication of federal constitutional claims when alternative state grounds are available." Hewitt v. Joyner, 940 F.2d 1561, 1565 (9th Cir. 1991), cert. denied, 112 S.Ct. 969 (1992). We therefore first consider Hussey's argument that the Portland ordinance violates an Oregon statute. Because we hold that it does, we do not reach Hussey's First and Fourteenth Amendment claims.

ORS § 260.665 prohibits, in relevant part, the

> giving or promising to give money, employment or other thing of value. . . . with the intent to induce any person to:
>
> (a) Register or vote;
>
> (b) Refrain from registering or voting;
>
> (c) Register or vote in any particular manner.

The parties do not dispute that the City of Portland is subject to § 260.665, or that the proffered subsidy is a "thing of value."

The more difficult question is whether the subsidy is offered with the intent to influence a "vote" or "voting." Section 260.665 does not define the terms "vote" and "voting."

Hussey argues that the consents to annexation, obtained in the elector's capacity, are votes within the meaning of the statute. He points to the dictionary definition of "vote" as "[a] formal expression of preference for a candidate for office or for a proposed resolution of an issue," *American Heritage Dictionary* 2004 (3d ed. 1992), and contends that the statute is reasonably construed to encompass an elector's formal consent to annexation.

The City argues that by definition consents are not votes -- they are consents. It submits that the "double majority" method for annexation does not involve an election, and because there is no election on an annexation under ORS § 199.490(2)(a)(B), no vote occurs. It also points out that the actual authority to approve or disapprove an annexation approved by the double majority method rests with the Portland Metropolitan Area Local Government Boundary Commission. ORS § 199.460; ORS § 199.495. Portland further contends that consents are not the equivalent of votes in an actual election because the double majority method of annexation is independent of other methods which do provide for elections, and because the Oregon legislature has specifically permitted cities to obtain consents to annexation in contracts "relating to extraterritorial provision of service." ORS § 222.115; ORS § 199.487(2). From this, the City infers, the legislature can't have meant to proscribe conditioning the provision of services on consent to annexation.

We believe that consents by electors are the functional equivalent of "votes" within the meaning of

§ 260.665.[2] Both must be returned by registered voters; both are official expressions of an elector's will; both are required to resolve political issues; and both require a majority for success. For this purpose it is immaterial that the tally does not take place in an "election"; "election" does not appear in § 260.665's definition of "undue influence," nor is the statute limited to inducing votes in an "election." We see no reason why the legislature would prohibit undue influence of registered voters in an annexation election, but would permit the same conduct when registered voters give their consent to annexation under the double majority method.

Nor are we persuaded that it makes any difference whether the legislature has provided for the recording of contracts between a city and a landowner for extraterritorial provision of service and consent to annexation. ORS § 222.115 is a recording statute,[3] which confers no authority for anything except recordation. Even if construed to imply approval of conditioning the provision of services on a landowner's consent to annexation, as Portland suggests, it says nothing about conditioning a subsidy on an elector's

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[2] We are not concerned in this case with that part of the Consent form which provides: "In the event the type of annexation used involves a vote, this agreement constitutes a waiver of the right to vote . . . . [S]uch persons shall count as yes votes . . . ." Portland did not annex Mid-County by this method, but by double-majority consent.

[3] O.R.S. § 222.115 states:

> A contract between a city and a landowner relating to extraterritorial provision of service and consent to eventual annexation . . . shall be recorded and, when recorded, shall be binding on all successors with an interest in that property.

consent to annexation, which is what Portland actually did. In any event, in this case Portland was prohibited from even conditioning its sewer services on annexation by the Environmental Quality Commission. Thus, its reliance on § 222.115 is misplaced.

Because the consents are analytically like votes, and are a substitute for them, they fall within the constraints of ORS § 260.665. As anyone who consents to annexation gets the subsidy, and any who does not, does not, the subsidy is not for annexation but merely for consent to it. This is a "thing of value" to induce an elector individually to consent to annexation. For these reasons the subsidy to electors for consent violates Oregon law.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHELLE HUSSEY, )
JAMES HUSSEY, MARY )
FRAN MATHIS, )
JOHN RUTHERFORD, and)
TERESA RUTHERFORD, )
Plaintiffs-Appellants, ) No. CV-92-1302-FR
v. )
CITY OF PORTLAND, a ) O P I N I O N
municipal corporation, )
Defendant-Appellant. )

FRYE, Judge:

The matters before the court are 1) the motion of the defendant for summary judgment (#26); and 2) the motion of the plaintiffs for summary judgment (#28).

## UNDISPUTED FACTS

The plaintiffs are resident homeowners in an area which is referred to by the defendant, the City of Portland, as "Mid-County." Mid-County is in eastern Multnomah County. Mid-County is not within the boundaries of the City of Portland.

In 1986, the Oregon Environmental Quality Commission ordered the City of Portland to construct sewers and to provide sewer services to resident homeowners of Mid-County in order to protect the quality of the drinking water in Mid-County. Pursuant to this order, the City of

Portland began the Mid-Multnomah County Sanitary Sewer System Improvement Project ("the Project").

Historically, the costs of public improvements, such as sewers, are assessed against the properties benefitted by the public improvements. The costs of constructing and connecting the sewers for the Project are being assessed by the City of Portland against the properties which receive the benefits of the improvements. These costs are called "local sewer special charges."

On March 11, 1992, the City of Portland adopted Ordinance No. 165188, which provides that the plaintiffs, and others similarly situated, may commit to connect with the Project, prior to December 31, 1992, for a sum substantially below the regular charges for the construction and connection of their sewers if they sign a document which states that they irrevocably consent to annexation by the City of Portland.

In Ordinance No. 165188, the Portland City Council established a Mid-County Sewer Financial Assistance Program for Certain Owners of Single Family Residential Property located in the Mid-Multnomah County Sanitary Sewer System Improvement Project. The Portland City Council states in the finding section of Ordinance No. 165188 that:

> 13. Through Resolution 33327, adopted February 23, 1983, the City Council adopted the Portland Urban Service Policy that established the conditions under which the City extends services to unincorporated areas. This is a

significant policy that affects the political, financial and service capacity of the City at the same time it insures that residents of the area will receive the full range of municipal services that will not be available from the County. It is appropriate for the City to extend financial assistance to those in the area that request annexation to complete this program. To encourage the alignment of Portland City boundaries with the Portland Urban Services Boundary in the Mid-County area, owners of single family residential property now outside the Portland City limits but inside the Portland Urban Services Boundary will be permitted full access to the Portland Mid-County Sewer Financial Assistance Program if consent to annex forms are signed and filed with the City of Portland. Allowing the "Consent to Annex" form to substitute for current city residency avoids a timing problem under which the pace of annexation may prevent otherwise qualifying property owners outside the city who want to annex from being able to take advantage of the "window of opportunity" created by the Mid County Assistance Program.

Exhibit B to Affidavit of Elden M. Rosenthal, p. 3.

The financial Assistance Program delineated in Ordinance No. 165188 is intended to facilitate the construction of sewers in Mid-County as mandated by the Oregon Environmental Quality Commission, and to provide financial assistance to defray the costs of the construction and connection of the sewers to owners of single family residential properties within the City of Portland, or to owners of single family residential properties in Mid-County who have consented to the annexation of their properties to the City of Portland. If the plaintiffs, and others similarly situated, do not consent to the annexation of their properties to the City of Portland, they will have charged against their properties the actual costs of constructing and connecting the sewers attributable to their properties in accordance with the general practice of the City of Portland.

The success of the Mid-Multnomah County Sanitary Sewer System Project depends upon the substantial prepayment of the costs of the construction and connection of the sewers by the residential owners, matched by accelerated construction schedules to take advantage of the currently depressed construction prices. Prepayment of the costs of the construction and connection of the sewers reduces the need for the City of Portland to finance these costs through the issuance of notes or bonds, which in turn reduces the total capital costs of the Project.

In order to encourage the prepayment of sewer costs through cash payments or installment contracts, the City of Portland has designed a program whereby property owners who signed up for the program on or before December 31, 1992 will pay costs of 50 cents per chargeable square foot of property; those who signed up for the program after December 31, 1992, and those who will sign up before June

30, 1993, will pay costs of 51.5 cents per chargeable square foot of property. Those who pay their construction and connection costs after June 30, 1993, but before December 31, 1993, will be allowed to "cap" their costs at 53 cents per chargeable square foot of property.

The Portland City Council has determined that in order to offer financial assistance to eligible property owners outside of the City of Portland, but inside of the Urban Services Boundary of the City of Portland, the participation of the entire sewer ratepaying base of the City of Portland is required. In order to ensure that the burden of funding the entire program does not fall upon the property owners who have not and do not elect to receive financial assistance under Ordinance No. 165188, the Portland City Council has directed the Bureau of Environmental Services of the City of Portland to establish the accounting procedures necessary to allocate the construction and connection costs to the entire sewer ratepaying base of the City of Portland, and to exclude the incremental costs of funding the program from the sewer rates charged to property owners outside the City of Portland who do not receive financial assistance. Therefore, for the biennium of July 1, 1993 through June 30, 1995, the Bureau of Environmental Services of the City of Portland will have a rate differential so that property owners outside of the City of Portland who do not receive financial assistance will have a lower sewer ratepaying base than will the property owners inside the City of Portland.

The plaintiffs have filed this action seeking declaratory relief pursuant to 42 U.S.C. §§ 1983 and 1988 to prevent the City of Portland from inducing people to consent to annexation to the City of Portland by charging those who consent to annexation a lower rate for the required sewer connection than those who decline to consent.

## CONTENTIONS OF THE PARTIES

The plaintiffs contend that an injunction should issue because the actions of the City of Portland are leading to the following consequences: 1) the people who are opposed to annexation to the City of Portland must choose between (a) paying a substantial penalty for their refusal to consent to annexation, or (b) making a political statement to which they do not agree; 2) the people who are opposed to annexation to the City of Portland will be charged substantially more for their sewer connections than those who consent to annexation; and 3) the City of Portland will avoid an election on the issue of annexation.

The City of Portland contends that this lawsuit is based upon a basic mischaracterization, namely that the plaintiffs will incur a "penalty" in their sewer construction and connection charges if they do not consent to annexation. The City of Portland explains that the plaintiffs will be charged only those sewer construction and connection costs attributable to their properties in accordance with the general practices of the City of Portland, and that if they choose not to consent to annexation, there is no "penalty."

## APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).

## ANALYSIS

The guarantees of freedom of speech prohibit "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential." Bigelow v. Virginia, 421 U.S. 809, 829 (1975).

The plaintiffs who decline to consent to annexation are charged the actual costs of sewer construction and connection as authorized by the municipal code of the City of Portland and by the laws of the State of Oregon. The fact that the costs to be paid by the plaintiffs is an estimate does not affect the outcome of this case. The preparation of pre-construction estimates of the actual costs of sewer construction and connection per property, by analyzing data from several recent, local sewer improvement districts by averaging those costs across the districts and adjusting for inflation, is an attempt to estimate the actual costs in advance of construction in order to finance the property.

The plaintiffs who decline to consent to annexation will not receive the financial benefits of Ordinance No. 165188 and will pay the actual costs of the construction. The plaintiffs who consent to annexation are free to speak out, publicly or privately, against annexation. The court concludes that the facts in this case do not amount to a violation of state or federal guarantees of free speech.

The general rule is that legislation is presumed to be valid and will be upheld if the classification drawn by the legislation is rationally related to a legitimate state interest. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). The City of Portland has set forth its policy reasons for offering the financial benefits set out in Ordinance No. 165188. This court concludes that the City of Portland has not violated the rights of the plaintiffs to the equal protection of the law.

## CONCLUSION

The motion of the City of Portland for summary judgment (#26) is granted. The motion of the plaintiffs for summary judgment (#28) is denied. The court will file a judgment in favor of the City of Portland.

DATED this 28 day of June, 1993.

/s/ Helen J. Frye

HELEN J. FRYE
United States District Judge

# SELECTED OREGON STATUTES

## Boundary Commission Statutes

**199.410 Policy.** (1) The Legislative Assembly finds that:

(a) A fragmented approach has developed to public services provided by local government. Fragmentation results in duplications in services, unequal tax bases and resistance to cooperation and is a barrier to planning implementation. Such an approach has limited the orderly development and growth of Oregon's urban areas to the detriment of the citizens of this state.

(b) The programs and growth of each unit of local government affect not only that particular unit but also the activities and programs of a variety of other units within each urban area.

(c) As local programs become increasingly intergovernmental, the state has a responsibility to insure orderly determination and adjustment of local government boundaries to best meet the needs of the people.

(d) Local comprehensive plans define local land uses but may not specify which units of local government are to provide public services when those services are required.

(e) Urban population densities and intensive development require a broad spectrum and high level of community services and controls. When areas become urbanized and require the full range of community services, priorities are required regarding the type and levels of services that the residents need and desire. Community service priorities need to be established by weighing the total service needs against the total financial resources available for securing services. Those service priorities are required to reflect local circumstances, conditions and limited financial resources. A single governmental agency, rather

than several governmental agencies is in most cases better able to assess the financial resources and therefore is the best mechanism for establishing community service priorities.

(2) It is the intent of the Legislative Assembly that each boundary commission establish policies and exercise its powers under this chapter in order to create a governmental structure that promotes efficiency and economy in providing the widest range of necessary services in a manner that encourages and provides planned, well-ordered and efficient development patterns.

(3) The purposes of ORS 199.410 to 199.534 are to:

(a) Provide a method for guiding the creation and growth of cities and special service districts in Oregon in order to prevent illogical extensions of local government boundaries and to encourage the reorganization of overlapping governmental agencies;

(b) Assure adequate quality and quantity of public services and the financial integrity of each unit of local government;

(c) Provide an impartial forum for the resolution of local government jurisdictional questions;

(d) Provide that boundary determinations are consistent with acknowledged local comprehensive plans and are, in conformance with statewide planning goals. In making boundary determinations the commission shall first consider the acknowledged comprehensive plan for consistency of its action. Only when the acknowledged local comprehensive plan provides inadequate policy direction shall the commission consider the statewide planning goals. The commission shall consider the timing, phasing and availability of services in making a boundary determination; and

(e) Reduce the fragmented approach to service delivery by encouraging single agency service delivery over service delivery by several agencies.

**199.415 Definitions for ORS 199.410 to 199.534.** As used in ORS 199.410 to 199.534, unless the context requires otherwise:

(1) "Affected city" means a city or cities, named in a petition, for which a boundary change is proposed or a city or cities, named in a final order, for which a boundary change is ordered.

(2) "Affected district" means a district or districts, named in a petition, for which a boundary change is proposed or a district or districts, named in a final order, for which a boundary change is ordered.

(3) "Affected territory" means territory described in a petition.

(4) "Boundary change" means a major or minor boundary change.

(5) "Boundary commission" or "commission" means a local government boundary commission formed under ORS 199.410 to 199.534.

(6) "City council" means the governing body of a city.

(7) "County board" means the county court or board of county commissioners of a county located within the jurisdiction of a boundary commission or proposed boundary commission.

(8) "District" means one of the districts named in ORS 199.420.

(9) "District board" means the governing body of a district.

(10) "Filing agency" means the county board, district board, city council or other public officer or agency designated by the principal Act to receive or take the first action on a petition for a boundary change.

(11) "Major boundary change" means formation, merger, consolidation or dissolution of a city or district.

(12) "Minor boundary change" means an annexation, withdrawal or transfer of territory to or from a city or district.

(13) "Owner" means the owner of the title to real property or the contract purchaser of real property, of record as shown on the last available complete assessment roll.

(14) "Petition" includes resolution, order, articles of incorporation and any other form of initiatory action for a boundary change.

(15) "Principal Act" means, with reference to a city, ORS chapters 221, except ORS 221.230, and 222 and, with reference to a district, the statutes, other than ORS 199.410 to 199.534, which describe the powers of an affected district including but not limited to the statutes under which a district is proposed or is operating.

(16) "Proceeding" means a proceeding to consider a boundary change.

(17) "Transfer of territory" means the process of simultaneous withdrawal and annexation of territory from one district to another district organized under the same principal Act other than ORS 198.705 to 198.955, or the simultaneous withdrawal and annexation of territory from one city to another city.

(18) "Withdrawal" includes the detachment, disconnection or exclusion of territory from an existing city or district.

**199.425 Local government boundary commissions; areas of jurisdiction.** Two local government boundary commissions hereby are created, one having jurisdiction in each of the following areas:

(1) The area consisting of Washington, Multnomah and Clackamas Counties.

(2) The area consisting of Lane County.

**199.460 Jurisdiction of boundary commission over boundary changes.** (1) A boundary commission has jurisdiction of a proceeding to consider a boundary change if any part of the territory included or proposed to be included within the affected city or district is within the jurisdiction of the commission.

(2) If the territory subject to the proceeding is within the jurisdiction of two or more commissions, the highest assessed value commission shall have primary jurisdiction in the conduct of the proceeding under ORS 199.410 to 199.534, and all other commissions having jurisdiction of the territory shall cooperate in the conduct of the proceeding. On the call of the highest assessed value commission, the commissions shall meet as a joint commission to hold hearings and to adopt a final order in the proceeding. As used in this subsection, "highest assessed value commission" means the commission having jurisdiction of the greatest portion of the taxable assessed valuation of the affected territory.

(3) Notwithstanding subsection (2) of this section, the local government boundary commission created by ORS 199.425 (1) shall not have jurisdiction over boundary changes involving cities or districts that are located primarily within Marion County and that were formerly within the jurisdiction of the Marion-Polk County Local Government Boundary Commission.

**199.487 Commission authority to initiate minor change; nonapplicability of certain boundary change procedures; effect ofcommission action.** (1) Within the jurisdiction of a boundary commission, a minor boundary change proceeding may be initiated as provided by ORS 199.490. In addition, a city annexation proceeding may be initiated as provided by ORS 222.750 or 222.840 to 222.915. Minor boundary change proceedings shall be conducted as provided by this section and ORS 199.490 to 199.534.

(2) ORS 222.111 to 222.180, 222.460 and the statutes of the state that govern annexation of territory to, or withdrawal of territory from, districts do not apply in territory subject to the jurisdiction of a boundary commission. However, a city annexation proposal initiated under ORS 199.490 may include a tax differential proposal authorized by ORS 222.111 (3). Notwithstanding ORS 199.490 (2)(b), 222.173 (1), 222.175 or any other requirement for obtaining consent to annexation, a city or district may use a consent to annexation contained in contracts authorized by ORS 198.869 or 222.115 in formulating annexation proposals or petitions under ORS 198.855, 199.490 (2), 222.125 or 222.170 for properties whose owners have signed such consents to annexation. ORS 222.530 shall not apply in territory subject to the jurisdiction of a boundary commission unless the affected territory constitutes at least 60 percent of the area and 60 percent of the assessed value of the district.

(3) Notwithstanding any charter or statutory provision to the contrary, a final order or a proclamation of a boundary commission declaring a minor boundary change approved is effective to change the boundary of the city or district without the necessity of any further action by the electors or the governing body of the city or district.

**199.490 Procedure for minor boundary changes or transfers of territory.** (1) A proceeding for a minor boundary change other than a transfer of territory may be initiated:

(a) By resolution of the governing body of the affected city or district;

(b) By petition signed by 10 percent of the electors registered in the affected territory;

(c) By petition signed by the owners of at least one-half the land area in the affected territory;

(d) By resolution of a boundary commission having jurisdiction of the affected territory; or

(e) When the minor boundary change is a withdrawal of a city from a district, by resolution of the governing body of the city, which shall be an affected city for the purposes of ORS 199.410 to 199.534. A resolution adopted under this paragraph may include a proposed tax base for the city that the city governing body considers sufficient to support the services provided by the district to the city.

(2)(a)(A) An annexation proceeding may also be initiated by a resolution adopted by the governing body of the affected city or district upon receiving consent to annex their land in writing from more than half of the owners of land in the territory proposed to be annexed, who also own more than half of the land in the territory proposed to be annexed and of real property therein representing more than half of the assessed value of all real property in the territory proposed to be annexed.

(B) A resolution adopted by the governing body of the affected city or district upon receiving written consent to annexation from a majority of the electors registered in the territory proposed to be annexed and written consent to the annexation of their land from the owners of more than half the land in the territory proposed to be annexed.

(b) However, before soliciting statements of consent for the purpose of authorizing an annexation under a proceeding initiated as provided by this subsection, the governing body of the affected city or district shall file a notice of intent to annex with the boundary commission having jurisdiction of the affected territory. The notice of intent to annex shall name the affected city or district and generally describe the boundaries of the territory sought to be annexed, which territory must be contiguous to the city or district or separated from it only by a public right of way or a stream, bay, lake or other body of water. The notice of intent to annex shall have attached to it a county assessor's cadastral map showing the location of the affected territory that the city or district proposes to annex.

(c) For the purpose of this subsection, consent need not be obtained for any land in a public way included within or contiguous to the territory proposed to be annexed. However, land in such a public way shall, as determined by the commission, be considered annexed to the affected city or district if the minor boundary change is approved, regardless of the land's ownership, size or assessed valuation.

(d) For the purpose of this subsection, consent need not be obtained for any real property that is publicly owned, is the right of way for a public utility, telecommunications utility or railroad or is exempt from ad valorem taxation unless the owner of such property files a statement consenting to or opposing annexation with the legislative body of the annexing city or district on or before the date the city or district adopts the resolution required by paragraph (a) of this subsection.

(e) As used in this subsection, "owner" has the additional meaning given that term in ORS 222.120 (7).

(3) A transfer of territory proceeding may be initiated:

(a) By joint resolution of the governing bodies of the affected districts or cities;

(b) By petition signed by 10 percent of the electors registered in the affected territory;

(c) By petition signed by the owners of at least one-half the land area in the affected territory; or

(d) By resolution of a boundary commission having jurisdiction of the affected territory.

(4) The petition or resolution shall:

(a) Name the affected city or district and state whether it is proposed to annex, withdraw or transfer territory;

(b) Describe the boundaries of the affected territory;

(c) If the proposal concerns a district, designate the applicable principal Act;

(d) Have attached a county assessor's cadastral map showing the location of the affected territory; and

(e) Be filed with the boundary commission having jurisdiction of the affected territory.

(5) When a city annexation is initiated:

(a) As provided by ORS 222.750 the petition proposing the annexation shall be filed with the boundary commission having jurisdiction of the annexation.

(b) As provided by ORS 222.840 to 222.915, the findings adopted by the Assistant Director for Health under ORS 222.880 shall be considered the initiatory action and a certified copy of the findings shall be filed with the boundary commission having jurisdiction of the annexation, at the same time a copy of the finding is filed with the affected city.

(6) Except when a boundary change is initiated by an affected city or district under subsection (1), (2), (3) or (5) of this section or by the Assistant Director for Health as provided by subsection (5)(b) of this section, the boundary commission shall notify the affected city or district that a petition has been filed or that the commission has adopted a resolution. If the petition complies with the requirements of the applicable statutes, the commission shall proceed as provided by ORS 199.460 to 199.463 and 199.490 to 199.519.

(7) Unless the parties appearing at a hearing for a minor boundary change or application under ORS 199.464 agree to a postponement of the adoption of a final order, a final order approving or disapproving a minor boundary change must be adopted within 90 days after the date the petition, resolution or application is filed with the commission. If a final order approving or disapproving a minor boundary change is not adopted within 90 days after the petition, resolution or application is filed or within the period of postponement, the petition, resolution or application shall be considered approved by the commission. A postponement shall not be for a period exceeding one year from the date the petition, resolution or application initiating the proposal is filed with the commission.

**199.495 Effective date of certain annexations; nonapplicability of certain health hazard annexation procedures.** In a proceeding initiated as provided by ORS 199.490 (2) and (5):

(1) If the proposed annexation is approved by the commission, the final order shall be effective at the time specified in the final order except that the effective date for an annexation initiated as provided by ORS 199.490 (5) shall not be more than one year after the date the final order is

adopted and for an annexation initiated as provided by ORS 199.490 (2) shall not be more than 10 years after the date the final order is adopted. If no effective date is specified in the final order, the order shall take effect on the date the order is adopted. The order shall not be subject to ORS 199.505.

(2) ORS 222.883 to 222.896, 222.900 (1) and (3) and 222.915 do not apply to proceedings initiated by the findings of the Assistant Director for Health.

**199.505 Effective date of minor changes; objection; election.** (1) If the boundary commission by its final order approves a minor boundary change other than a transfer of territory or a withdrawal initiated under ORS 199.490 (1)(e) that proposes a new tax base for a city, the change shall take effect at the time specified in the final order. Except for annexation proceedings initiated by a city or district, the effective date shall not be less than 45 days, nor more than one year, after the date the commission adopts the final order approving the change. For annexation proceedings initiated by a city or district, the effective date shall not be earlier than 45 days, nor more than 10 years, after the date the commission adopts the final order approving the change. If no effective date is specified in the final order, the order shall take effect 45 days after the commission adopts the final order approving the change. However, the change shall not take effect unless it is also approved by the electors if within 45 days after the date of the adoption of the order:

(a) Written objections to the change signed by not less than 10 percent or 100, whichever number is the lesser, of the electors in the affected territory are filed with the commission; or

(b) A resolution objecting to the change adopted by the city council of the affected city or district board of the affected district is filed with the commission.

(2) If objections as required by this section are filed by a city council or district board, the council or board shall call and hold an election in the affected city or district on the boundary change as approved. If objections are filed by the electors, the commission shall certify the fact of the objections to:

(a) The city council or district board of the affected city or district, if the change involves a withdrawal of territory, whereupon the council or board shall call an election in the city or district.

(b) The county board of the county where the territory is located, if the change involves an annexation, whereupon the board shall call an election in the territory. Where a minor boundary change has been initiated pursuant to ORS 199.490 (1)(a), cost of an election required by this paragraph shall be paid by the city or district to which the territory is proposed to be annexed.

(3) An election required by subsection (2) of this section shall be held on the next appropriate election date authorized under ORS 203.085, 221.230 or 255.345. A city council or a board that calls an election under this section shall certify the results of the election to the commission. If a majority of those voting on the proposition in each election approve the change approved by the commission, the commission thereupon shall proclaim the results of the election. Upon the adoption of the proclamation the change shall take effect.

## Genearl Annexation Statutes

**222.115 Annexation contracts; recording; effect.** A contract between a city and a landowner relating to extraterritorial provision of service and consent to eventual annexation of property of the landowner shall be recorded and, when recorded, shall be binding on all successors with an interest in that property.

**222.173 Time limit for filing statements of consent; public records.** (1) For the purpose of authorizing an annexation under ORS 222.170 or under a proceeding initiated as provided by ORS 199.490 (2), only statements of consent to annexation which are filed within any one-year period shall be effective, unless a separate written agreement waiving the one-year period or prescribing some other period of time has been entered into between an owner of land or an elector and the city.

(2) Statements of consent to annexation filed with the legislative body of the city by electors and owners of land under ORS 222.170 are public records under ORS 192.410 to 192.505.

Note: 222.173 to 222.177 were added to and made a part of ORS chapter 222 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**222.750 Annexation of unincorporated territory surrounded by city.** When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not

within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory.

**222.855 Annexation to remove danger to public health.** In addition to the procedures authorized in ORS 222.010 to 222.750, territory otherwise eligible for annexation in accordance with ORS 222.111 which is within the urban growth boundary of a city may be annexed by passage of an ordinance as provided in ORS 222.900 without any vote in such territory or any consent by theowners of land therein if it is found, as provided in ORS 222.840 to 222.915, that a danger to public health exists because of conditions within the territory and that such conditions can be removed or alleviated by sanitary, water or other facilities ordinarily provided by incorporated cities.

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

No. 95-786

In the
SUPREME COURT OF THE UNITED STATES
October Term 1995

CITY OF PORTLAND, a municipal corporation,
*Petitioner*,

v.

MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, AND TERESA RUTHERFORD,

*Respondents*.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

# RESPONDENTS' BRIEF IN OPPOSITION

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# QUESTION PRESENTED

Where the consent of *electors* is required by state law for governmental action, may a municipality provide a substantial monetary benefit to individual electors in exchange for their consent?

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In the
SUPREME COURT OF THE UNITED STATES
October Term 1995
No. 95-786
CITY OF PORTLAND, a municipal corporation,
*Petitioner*,
v.
MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, AND TERESA RUTHERFORD,
*Respondents*.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

# RESPONDENTS' BRIEF IN OPPOSITION

## STATEMENT

1. Respondents are residents of an area of Multnomah County, Oregon known as Mid-County. When this action was filed, Mid-County was outside the limits of petitioner City of Portland.

For environmental reasons, the State of Oregon, in 1986, required all Mid-County residents to connect to Portland's sewer system, and required Portland to permit Mid-County residents to connect to the municipal sewer system even though they were not city residents. Explicitly taking advantage of this opportunity to extend its boundaries, Portland enacted Ordinance 165188. The ordinance offered individual Mid-County electors a substantial reduction in sewer hookup costs in exchange for their irrevocable consent, in their capacity as *electors*, to annexation of Mid-County by petitioner.

Annexation, insofar as relevant to this case, can occur in Oregon only if a majority of *electors* within a given geographic

area consents to the annexation. The higher cost for nonconsenting electors to connect to the city sewer system was sufficient to cause financial hardship to them. Mid-County electors who oppose annexation, and thus refused to sign consents, are not eligible for the sewer hookup cost reduction even if they are subsequently annexed. The program was successful in obtaining the necessary consents, and, while this action was pending, portions of Mid-County were annexed to Portland.

The electors' consents are permanent[1] and irrevocable. In addition, they state:

> "In the event the type of annexation used involves a vote, **this agreement constitutes a waiver of the right to vote on the annexation** by persons who reside at the property if not the owner or owners who are qualified to vote on the annexation. Further, **such persons shall count as yes votes on the annexation.**"

(Emphasis added).

Individual electors who consented to annexation received the cost reduction, regardless of whether or when they were annexed. Electors who refused to consent did not receive the cost reduction, regardless of whether or when they were annexed.

2. Respondents challenged the program as a violation of their First and Fourteenth Amendment rights to speech and to vote and also as inconsistent with Oregon law. The Ninth Circuit held that Ordinance 165188 violates plaintiffs' voting rights, without reaching the free speech issues.

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[1]The consent form waived the statutory one year time limit on the consents of electors found in Or. Rev. Stat. 222.173. Appellant's Opening Brief to the Ninth Circuit Court of Appeals, Add-25.

The Court of Appeals focused on the unique aspect of Oregon law that requires consents to be provided by *electors* in addition to those required by property owners. The Court recognized that Oregon was plainly under no constitutional obligation to require any form of voting as a pre-condition to annexation. Nevertheless, the State's decision to employ consents given by *electors* in a manner that is "analytically like votes" cast by electors meant that both processes "legally must be treated" the same. Pet. App. 9.

The Court of Appeals then considered whether Portland could regulate the exercise of voting rights in the way it regulated the consent process. The Court analogized Portland's ordinance to a poll tax that is levied on the *content* of the voter's choice, and held that this would be manifestly unconstitutional. Accordingly, because Portland lacked a compelling justification for its effort to coerce votes for annexation and because Portland had constitutionally valid means available to induce support for annexation, the court below concluded that the ordinance was unconstitutional.[2]

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[2]In its previous opinion, which the Court withdrew in order to decide the constitutional issue, the panel held that Portland's ordinance was invalid under Oregon Revised Statutes 260.665, which prohibits giving anything of value to induce a person to "vote in any particular manner." The Court followed the reasoning it later employed on the constitutional issues in holding that the consents should be treated the same as votes under state law and thus the financial inducements offered by the State were unlawful. Pet. App. 14-20. The panel did not explain why it chose to decide the issue exclusively on constitutional grounds in its second opinion. Of course, if the Court were to grant review of this case, respondents would urge this state law ground as an alternative basis for affirmance. This provides an independent reason for the Court not to consider the issue posed by petitioner in this case.

## REASONS FOR DENYING THE PETITION

Petitioner's hyperbole notwithstanding, the decision of the Court of Appeals is limited to the situation where a state chooses to place the primary annexation choice in the hands of registered voters. The Court's decision to treat such a choice as analytically similar to a "vote," and thus subject to the Fourteenth Amendment's reasonable constraints upon how a state may intrude into the voting process, is plainly a narrow decision. Moreover, it is a holding that conflicts with no decision of this Court or any other court. Indeed, the only decision that involves a government's attempt to purchase electors' consents reached exactly the same conclusion. See *Town of Fond du Lac v. City of Fond du Lac*, 22 Wis.2d 533, 126 N.W.2d 206 (Wis. 1964). Because of the narrowness of the holding, it will not meaningfully restrict future efforts by other jurisdictions to annex property. In short, the decision below presents no issue worthy of review by this Court, and therefore, the Court should deny the petition.

1. The Circuits are not divided on the issues decided by this case; no Circuit decision has confronted such a direct and egregious attack on voting rights.

In this case, Portland provided voters a substantial monetary benefit (approximately $2,000.00 to an "average" homeowner) for their permanent and irrevocable consent, in their capacity *as voters*, on a matter of public concern. Neither party has located any reported federal circuit or district court cases on this issue. No reported federal case has ever held that where a government action may be taken only with consent of electors, electors are not entitled to a full and free exercise of that consent.

The City argues that two cases challenging annexations through the consent of property owners "implicitly" decided "whether signing an annexation consent or annexation request form was the same as a vote." Pet. at 6-7, citing *Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984), and *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978). Neither case, however, presented the

issue raised here, whether the consent of *electors* on a matter implicated voting rights.

In *Berry*, the plaintiff challenged a South Carolina statute permitting annexation of an area upon the filing of a petition signed by at least 75% of the freeholders in the area. The plaintiff argued that the statute, by providing a vote to *property owners* but not voters, violated voters' rights to equal protection. In *Carlyn*, the City of Akron annexed contiguous property pursuant to an Ohio statute providing that annexation could be ordered by a county commission upon the request of petitioning property owners. 726 F.2d at 289. The *Carlyn* plaintiffs challenged an annexation initiated by *property owners*, arguing that their lack of a vote violated equal protection.

Both courts held that no violation of voting rights had occurred because the consent of the *property owners, in their capacity as property owners*, were not votes. They reached this result because the annexations also depended on the consents of a government body. The *Berry* and *Carlyn* courts needed only to decide whether the consent of the property owners, in their capacity as property owners, were the equivalent of votes. To be sure, those courts reasoned that the necessity of governmental action after *property owner consents* meant the consents were not "votes." While the Ninth Circuit expressly disagreed with this logic, pointing to bond issues and the electoral college as examples to the contrary, this disagreement is purely academic.

The Ninth Circuit was faced with a different question: where the consent of *electors, in their capacity as electors,* is required for governmental action, may a government provide a substantial monetary benefit to individual electors in exchange for their consent? In addressing the issue, the court explicitly agreed with the results of *Berry* and *Carlyn*. The Ninth Circuit refused to extend the reasoning of those cases to the decisions of *electors*, and concluded that the electors' consents in this case are votes.

There is no conflict between the circuits on the issue posed by the *holding* below.

A great deal of petitioner's policy argument is based on a steadfast disregard of the Court of Appeals' basic holding. While claiming extravagantly (Pet. 18-23) that the Court of Appeals' analysis will hamstring the ability of all states and municipalities to pursue innovative forms of annexation and thus will discourage any efforts to democratize the annexation process, Portland briefly owns up to the "determining factor" in this case. This is the unique requirement in Oregon that registered voters must provide the consents, and in Portland that consents may be purchased. Thus, as Portland concedes, the decision below does not affect any annexation scheme that does not place the decision squarely in the hands of "voters."[3]

Portland's entire argument thus reduces to urging this Court to adopt the City's *ipse dixit* that "not every expression of position

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[3]Petitioner cites sections of the annexation statutes of 24 states which it erroneously claims will be affected by the decision of the Ninth Circuit. Pet. 19 n. 9. In fact, Petitioner cites no statute or ordinance which, like the one at issue here, permits a government to purchase needed individual consents to annexation from electors. The holding below attacked Portland's ordinance, not Oregon's annexation law.

Respondents have reviewed the 24 statutory sections petitioner cites. Those sections reveal diverse approaches to annexation, but only a few of the cited sections refer to electors, and only two require the consent of a majority of electors for annexation. Of the statutory sections cited, only those of Illinois and New Jersey arguably require the "consent of the governed" for annexation as under Oregon law. Pet. App. 9. The cited Illinois and New Jersey statutory sections permit annexation only after a majority of electors petition for that annexation. Ill. Rev. Stat. Ch. 65 § 5/7-1-2 (1995); N.J. Rev. Stat. § 40A:7-12 (1994).

Thus, the holding of the Ninth Circuit would affect only those few states that require the consent of a majority of electors for annexation, and only to the extent that it would prevent annexing bodies from paying electors for their consents.

on public issues by an elector is a vote." But, even if that proposition is correct (which Portland makes no effort to prove), it still overstates the holding below because the Court of Appeals did not even adopt this modest principle of law. It merely held that actions by electors in Oregon's annexation statute are analytically similar to votes. That inherently case-bound ruling is both reasonable and plainly not worthy of review by this Court.

2. The issue presented by this case is extremely rare, and there is *no* disagreement between cases addressing that issue.

The parties have located only one reported case, besides this one, dealing with the individualized purchase of electors' consent. *Town of Fond du Lac v. City of Fond du Lac*, *supra*, concerned the City of Fond du Lac's attempt to annex 188 acres of land. In order to obtain the signatures of tenant *electors* living there, the city used economic incentives (a year of free rent) and disincentives (the threat of eviction). The Wisconsin Supreme Court held that the right of an *elector* to participate in an annexation proceeding is analogous to voting on the question. 126 N.W.2d at 204 (1964). The court noted that "the signing of an annexation petition, like voting, constitutes participation in a governmental process" which is "governed by a higher standard of conduct than prevails in the marketplace -- votes are not a commodity of commerce." *Id.* Accordingly, the court struck down the annexation attempt. The Ninth Circuit correctly cited this case with approval.[4]

Portland cites three other cases in support of its position. None of these cases is inconsistent with the result of the Ninth Circuit here. Rather, each of the cited cases deals solely with the

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[4]The Ninth Circuit also referred to *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972), in which a statute allowing property owners to prevent an election on annexation was subjected to strict scrutiny because it touched upon the right to vote.

question of whether annexation (or in one case, de-annexation) petitions are equivalent to "votes."

*Willows v. City of Lewiston*, 461 P.2d 120 (Idaho 1969) held that annexation consents of *property owners, in their capacity as property owners*, are not equivalent to votes under the Idaho Constitution. As noted above, the Ninth Circuit explicitly approved a similar conclusion as to the federal Constitution as set out in *Berry* and *Carlyn*.

In *Township of Jefferson v. City of West Carrolton*, 517 F.Supp. 417 (S.D. Ohio 1981), *aff'd* 718 F.2d 1099 (6th Cir. 1983), an Ohio annexation statute provided that one means of annexation was by a petition by a majority of landholders in the affected area. The plaintiffs sought application of voting rights to the property owner consent process under due process and equal protection grounds, because other methods of annexation in Ohio were based on elections. The court disagreed, holding that the consent of *property owners* is not equivalent to the consent of electors under other Ohio annexation methods because the consents are not the final acts triggering annexation. 517 at 421. The Ninth Circuit would disagree with this reasoning, but agree with the result.

*Town of Falls Church v. County Board of Arlington County*, 184 S.E. 459 (Va. 1936), involved a judicial de-annexation process in Virginia. The statute required that a petition for de-annexation be signed by a majority of the qualified voters in the affected area, and then presented to a court for approval. Standards for de-annexation were spelled out in the statute, and included, *inter alia*, a requirement that the court find the "general good of the community will not be affected" by the proposed de-annexation. 184 S.E. at 463. The court held that the filing of a judicial petition [i.e., complaint] is not an election. The court did not consider whether federal voting rights were implicated; the issue apparently was never raised. The petition had to be served on the annexing body and notice provided to the "residents or freeholders"

of the affected area, any of whom could intervene in the action. 184 S.E. at 464. The court held that the petitions to begin this judicial process were not part of an election within the meaning of the Virginia Constitution.

In sum, the only two courts which have considered the precise matter raised here are in agreement that where electors, as electors, are required to consent to municipal annexation, they may not be paid for their consents. The issue has rarely been contested, and is not a recurring one.

3. This case, in which Portland paid individual electors approximately $2000.00 for their votes, does not present a close question; the opinion of the Ninth Circuit is plainly correct.

Portland argues that the consent of electors is not a vote because the final outcome of the issue was not immediate and depended on another entity. As the Ninth Circuit noted, Portland's definition of "vote" excludes presidential races (where the outcome depends on the electoral college), and municipal bond elections (where voter approval does not require issuance of the bonds). Nor should the length of time, or the fact that a traditional election[5] was not subsequently held make any difference; Portland has purchased the permanent proxy of some Mid-County electors. Even if those proxies are never used, they were obtained wrongfully.

This case is not about the mere extension of financial aid to some future city residents. As the Ninth Circuit noted, the ordinance adopted by Portland "severely and unreasonably interferes" with voting rights. App-11.

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[5]Oregon is not wedded to the traditional voting booth. The state uses extensive mail balloting (mailed to voters 14 to 20 days before they are due), and extensive use of absentee ballots (mailed up to 45 days before the election). Or. Rev. Stat. 254.465, 254.470; 253.045(1), 253.065(1).

> "But unlike a poll tax, which applies regardless of how a voter casts his ballot, this subsidy is conditioned on how an elector votes. In this way, the Portland ordinance is even more distorting than a poll tax." App-11.

Portland makes no effort to argue that its action would be permissible if an actual election were conducted. This is because such an interference with voting is unquestionably unconstitutional. Thus, the only issue is whether Oregon's electoral annexation procedure is like a vote, and that issue does not warrant further review.

4. No Tenth Amendment issue was raised below, and in any event, is not presented by this case.

Portland argues that interference with its purchase of individual electoral consents violates the Tenth Amendment. This argument was never raised below, and need not be considered by this Court. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Portland argues that deciding what is or is not a vote is a matter left to the states under the Tenth Amendment. Even if that were true, by explicitly requiring the consent of electors, Oregon made that decision and, by adopting a process "analytically like" voting, the state chose to subject the process to federal constitutional protection designed to protect voting. This Court has long held that once a state provides an opportunity for a vote on an issue, the vote is constitutionally protected. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628-9 (1969). If that guarantee has any meaning at all, a court must be able to look behind the label to determine whether the act is a vote or its equivalent. As the Ninth Circuit pointed out below, labelling cannot be dispositive; otherwise a state could evade laws protecting voters merely by declaring that elections would be decided through collecting

"consents." Pet App 6. In any event, Oregon specifically chose a system which included the consent of "electors."

As explained previously by the Court of Appeals, there are numerous methods available to the state to provide for annexation without raising serious constitutional issues, and there are methods available to Portland that trigger none of the concerns present in this case. Under these circumstances the modest restrictions placed upon the local jurisdictions' options hardly presents a serious Tenth Amendment problem. Certainly, this is not a suitable vehicle for considering the scope of the Tenth Amendment.

## CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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